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Supreme Court, U.S.
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MAR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIS MARS EMBERTON and
PHYLLIS EMBERTON, dba
EMBERTON MACHINE AND TOOL, INC.,
a California corporation,

Plaintiffs and Appellants,

vs.

COUNTY OF SAN DIEGO,

Defendants and Respondents.

PETITION FOR REVIEW OF DECISION
OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE

DAN ZEIDMAN,
THACHER, HURST, CONAWAY & ZEIDMAN
411/413 South Magnolia Avenue
P. O. Box 1644
El Cajon, CA 92022
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40 pp

QUESTION PRESENTED

Is California Revenue and Taxation Code Section 5147, which requires the dismissal of a tax refund complaint when the summons and proof of service are not returned to the Court within one year, even when the defendant has answered the complaint within that year (general appearance exception), invalid as a violation of Equal Protection and Due Process since it unfairly, unequally, and arbitrarily eliminates the general appearance exception, which applies to every other case in California except a tax refund case?

PREFIX

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OCTOBER TERM, 1986

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vs.

COUNTY OF SAN DIEGO,

Defendants and Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

This is an appeal from dismissal of the tax refund complaint filed by the petitioners, WILLIS MARS EMBERTON, et al. (hereinafter sometimes referred to as

"EMBERTON") pursuant to California Revenue and Taxation Code Section 5147. Section 5147 requires dismissal of a tax refund complaint when the summons and proof of service are not returned to the court within one year, even when the defendant has answered the complaint within that year. In all other actions filed in California, there is no requirement to return the summons and proof if the defendant as already answered the complaint, since answering the complaint accomplishes what the return would accomplish, i.e., notification to the Court of personal jurisdiction over the defendant.

The petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment of the California Court of Appeal, Fourth Appellate District, Division One (Per Benke, J, assigned by the Chairperson of the Judicial Counsel) filed on September 23, 1986. The opinion was initially unpublished,

was changed to a published opinion of the Court of Appeal. Thereafter, an Order denying review of the California Supreme Court was issued on December 17, 1986.

OPINION BELOW

The opinion below is the published opinion of the California Court of Appeal which is attached hereto as Appendix "A". The denial of the "Petition for Review" by the California Supreme Court is attached hereto as Appendix "B".

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

CALIFORNIA REVENUE AND TAXATION CODE SECTION 5147 CLAIMED INVALID

"No such action hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all such actions hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any defendant therein unless the summons shall have been issued and served and the return thereon made within one year after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended."

STATEMENT OF THE CASE

On April 24, 1984, appellants filed a complaint for refund of personal property taxes on machinery and equipment and injunctive relief against respondents, COUNTY OF SAN DIEGO, et al. (hereinafter sometimes referred to as COUNTY). The Summons and

Complaint were served by EMBERTON on July 17, 1984.

On August 6, 1984, COUNTY filed a motion objecting to proceeding in the El Cajon Municipal Court (acting as a Superior Court). COUNTY'S answer was served by mail on EMBERTON'S counsel on August 9, 1984, and filed on August 10, 1984.

On September 20, 1984, the motion objecting to the El Cajon court was heard without opposition and was granted. On September 26, 1984, the court ordered the matter transferred to San Diego Superior Court.

The one year period established by Revenue and Taxation Code Section 5147 in which return of summons and proof of service must be made to the court lapsed on April 25, 1985, without such act accomplished by EMBERTON. On June 18, 1985, COUNTY first attempted to file its motion to dismiss

pursuant to Revenue and Taxation Code Section 5147 in the El Cajon Court, which returned the attempted filing to counsel for COUNTY on June 19, 1985. On June 27, 1985, the motion to dismiss was properly filed with the San Diego Superior Court.

Argument on the motion to dismiss was heard on August 2, 1985. The court granted COUNTY'S motion to dismiss and issued its order on August 14, 1985. EMBERTON filed a Notice of Appeal on October 1, 1985. Following argument and submission of the case, the Court of Appeal affirmed the lower court's decision on September 23, 1986. This decision was certified for publication on October 8, 1986, at COUNTY'S request.

The issue of invalidity of Section 5147 based upon its violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment was raised below. The court held that Section 5147 was reasonably

related to the need to move cases expeditiously through the judicial system and was therefore not violative of Equal Protection or of Due Process. (Opinion of Court of Appeal, pp 5-6). EMBERTON now petitions this court for review of the decision below.

ARGUMENT

I
REVENUE AND TAXATION CODE SECTION 5147 IS UNCONSTITUTIONAL AS APPLIED AS A VIOLATION OF EQUAL PROTECTION.

Appellants readily concede that the Equal Protection Clause does not deprive the states of their power to establish and regulate their courts and to prescribe the nature and extent of their jurisdiction. It is also clear that it is not violative of the Fourteenth Amendment for the Legislature to prescribe the method of procedure as to the issuance and service of process. Hence, appellants do <u>not</u> argue that Section 5147 is invalid because it imposes a one year statute

of limitations.

But despite the fact that the Equal Protection Clause does not guarantee uniformity of procedure, it is fundamental that if the Legislature chooses to classify litigation and adopt one type of procedure for one class of cases and a different type for another, the prescribed procedure must affect alike all similarly situated. Dohany v. Rogers (1930) 281 U.S. 362, 369, 50 S.Ct. 299, 302. Specifically, there must be a rational relationship between such a classification and the achievement of legitimate governmental ends. G.D. Searle & Company v. Cohn (1982) 455 U.S. 404, 408, 102 S. Ct. 1137. Classification which serves as a basis for unreasonable and arbitrary discrimination between people in meting out justice violates the Fourteenth Amendment. Haley v. Troy (1972) 338 F. Supp. 794, 801.

Section 5147 is unconstitutional because the classification resulting from application of the statute unreasonably and arbitrarily discriminates against taxpayers seeking a refund for taxes paid by eliminating the "general appearance exception" to return of service. In fact, three separate discriminating dichotomies exist:

1. The class of taxpayer-plaintiffs who do not make the return within one year but have served the defendant and have insisted on having an answer filed vs. the class of taxpayers who do make the return within one year.

2. The class of taxpayer-plaintiff who have had the answer filed without making the return vs. the class of general plaintiffs who can ignore the return requirement once the answer is filed.

3. The taxpayer who files for a refund vs. the county that files for an unpaid tax.

The Court of Appeal justified its holding of constitutionality on the ground that "[e]ven if the return serves no purpose except as a device to eliminate cases after one year, it is a device which can find a reasonable basis in this need to act expeditiously." (Opinion of the Court of Appeal, page 5). With all due respect, this statement simply makes no sense at all. The elimination of the "general apperance" exception to the return of process rule in those cases involving claims for tax refunds does <u>not</u> bear a rational relationship to the achievement of an otherwise legitimate governmental end: The expeditious movement of cases through the judicial system. In fact, it is the general appearance of the defendant (which can be achieved by answering the complaint, as in the present case) which most expeditiously moves the case along, <u>not</u> the return of service.

This lack of a rational relationship between Section 5147 and the goal of timely dispensation of a case can be illustrated by the following example:

> Taxpayer A files his suit for refund on May 1, 1984. Taxpayer B files his suit for refund on the same day. Taxpayer B is exceedingly diligent and serves his summons and complaint on the very day he files, i.e. May 1, 1984. Taxpayer A is not so diligent and waits until May 1, 1985 to serve his summons and complaint. Taxpayer A then returns the summons and proof of service to the court within the Section 5147 deadline, i.e. May 1, 1985. Taxpayer B does not.
>
> However, during the first year of both lawsuits, Taxpayer B has had his defendant answer the complaint

in a timely manner and has had available to him all of the requisite discovery tools for eleven months. Notwithstanding this fact, Taxpayer B's suit can be dismissed even before Taxpayer A's suit is answered by the defendant. Taxpayer A is protected and Taxpayer B is out of court. Query: Who has endeavored more to fulfill the apparent reason for the statute, i.e. to promote quicker trials? Why Taxpayer B, of course.

The point is that the reason for having a summons and proof of service returned to the court is merely to notify the court that personal jurisdiction has been obtained on the defendant. This notification is automatically fulfilled once the defendant files an answer to the complaint. When that occurs, whether or not the original summons

and proof of service have been returned to the court has absolutely nothing whatsoever to do with promoting a quicker trial. The obtaining of personal jurisdiction, by whatever means, is the act that promotes quicker trials.

As stated above, Section 5147 results in three separate classification sets. There exists no conceivable legitimate state interest in allowing a dismissal under the facts of this case in one class, but no dismissal in the other, in any of the three classification sets.

With respect to dichotomy No. 3 in particular, it is most curious to note the manner in which the Legislature has discriminated against the taxpayer but not the governmental entity collecting the tax. Both statutory schemes (the taxpayer's suing the County for a refund or the County's suing the taxpayer for the tax) explicitly give

judicial priority to such lawsuits. (Revenue and Taxation Code Section 5146 and Section 3006, respectively.) However, only the governmental entity enjoys the type of dismissal defense contemplated under Section 5147.

In fact, when the government sues the taxpayer, the government is totally absolved under the normal Civil Procedure rules from making a return once the taxpayer files an answer. Apparently, what is "good for the goose is not good for the gander" despite the inherent unfairness and absurdity of such diverse treatment of different plaintiffs' seeking access to the courts. (Is this entire scenario not really a legal trap for the unwary, whereby the Legislature has endeavored to give the state a totally unnecessary procedural shield at the expense of the individual taxpayer? Of course that is precisely what Section 5147 has done.)

Appellants direct the court's careful attention to a very fine Stanford Law Review article on the entire concept of analyzing Equal Protection issues. (Simpson, "A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause" (1977) 29 Stan. L. Rev. 663.) Therein, the author has developed an intriguing model for such analyses. (See pp 678-681) While there are various ways to interpret the "discriminatory effect" and the "governmental justification" vis-a-vis the case at bar, any reasonable juxtaposition of the criteria within the model gives the same results: the individual challenging the law (I) must prevail over the governmental body defending it(G).

For example, in the case at bar the most reasonable position within the model would be as follows: Discriminatory effect = Significant interest x total disadvantage. In other words, the access to the courts to

redress alleged improper taxation is at least a "significant interest" if not a "fundamental" one. (See Payne v. Los Angeles County (1967) 17 Cal. 3d 908, 914, 132 Cal. Rptr. 405, 410 wherein the Supreme Court reiterated "a constitutional right of access to the Courts for all persons...") Furthermore, quite obviously a total dismissal as is contemplated here is certainly a "total disadvantage."

On the "governmental justification" side, the most reasonable position on the model would be as follows: Governmental Justification = Nonexistent Relation. This would be derived from the fact that there is no legitimate rationale for the Section 5147 rule in a case where the governmental body has already filed an answer. Thus, given the above positions on the model, the juxtaposition of the two axes clearly shows that the individual (I) taxpayer in the case

must prevail.

(Please note: Even giving the County the most plausibly liberal use of the model, e.g. Significant interest x Significant Disadvantage vs. Compelling Interest x Insignificant Relation, the individual (I) still prevails.)

II

REVENUE AND TAXATION CODE SECTION 5147 IS UNCONSTITUTIONAL AS A VIOLATION OF DUE PROCESS.

Not surprisingly, this is a classic case wherein the Equal Protection and Due Process problems with a statute blend and overlap. The Due Process issue can best be analyzed in terms of the language in Payne, supra, the "access to courts" case. The Supreme Court in Payne, quoting the U.S. Supreme Court, stated that "absent a counteravailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be

given a meaningful opportunity to be heard." (citation omitted) In effect, the state, through Section 5147, is depriving taxpayers of property without due process of law when the law is so totally void of substance, meaning and logic as explained herein.

At the risk of being redundant, appellants ask once again: What difference can it possibly make whether or not return is made once the defendant files an answer if the true purpose of the statute is to expedite the trial process? A "return" made under such circumstances is a meaningless and pro forma act in the extreme. It is the epitome of "form over substance" which neither the State or Federal Constitutions can tolerate.

In fact, the early framers of the California Codes in 1872, as well as the framers of the Federal Constitution, were particularly aware of the abhorrence with

which a democracy must view a law devoid of any semblance of common sense. Thus, the California framers wrote into the California Civil Code the following "maxims of jurisprudence" which are fundamentally relevant to the issue at bar:

> 1. When the reason of a rule ceases, so should the rule itself (Civil Code Section 3510);
>
> 2. The law respects form less than substance (Civil Code Section 3528);
>
> 3. The law neither does nor requires idle acts. (Civil Code Section 3532);
>
> 4. The law disregards trifles. (Civil Code Section 3533.)"

The point here is that the Court simply cannot allow a statute to be interpreted, or to pass constitutional muster, when to do so would result in purely nonsensical, pro forma adherence to rigid, ridiculous rules. This is particularly true when the rules are simply procedural and the defendant is the

government. It is long past the time when the King demanded and was given such mindless deference.

CONCLUSION

For the foregoing reasons, appellants respectfully urge this Court to grant cert. to invalidate Section 5147 as applied herein.

To reiterate, appellants are not attempting to invalidate the one year statute in and of itself. It is the elimination of the "general appearance" exception that is invalid and does not pass even the most minimal Constitutional scrutiny. In the absense of a plausible, legitimate state purpose in not including the "general appearance" exception to the statute, there is a clear violation of the Equal Protection and Due Process clauses. Assuming the most minimal judicial review and indulging in the strongest presumption of constitutionality, one cannot find a legitimate Legislative

purpose in this statute as applied herein.

The court cannot simply infer from the enactment of a statute that the statute furthers a legitimate state interest. There must be some independent showing of a rational state interest. There is not even the semblence of a scintilla of such a showing here.

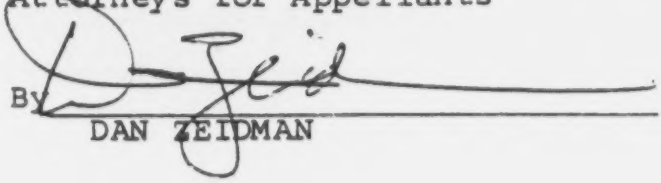
Finally, the very fact that the "general appearance" exception applies to virtually every other civil complaint filed in the State of California, even to other cases with judicial priority, demonstrates that the lack of such an exception in the context here is totally lacking in merit, logic or rationality. In a word, it is a stupid law. This may not sound scholarly, but it is the truth. If the Federal Constitution means anything, it means that the State cannot whimsically block a taxpayer's access to the courts.

Appellants respectfully urge this court to accept review of this appellate decision so that some measure of common sense can be restored in such tax cases.

Dated: March 10, 1987

Respectfully submitted,

THACHER, HURST, CONAWAY & ZEIDMAN
Attorneys for Appellants

By 
DAN ZEIDMAN

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIS MARS EMBERTON, et al.,	)	
	)	
Plaintiffs and Appellants,	)	D 003701
	)	
vs.	)	
	)	(Sup.Ct. No.
COUNTY OF SAN DIEGO, et al.,	)	519900)
	)	
Defendants and Respondents.	)	
	)	

THE COURT:

Please certify for publication. The attorneys of record are:

Thacher, Hurst, Conaway & Zeidman and Dan Zeidman, for Plaintiffs and Appellants.

Lloyd M. Harmon, Jr., County Counsel, Daniel J. Wallace, Chief Deputy County Counsel and Bruce W. Beach, Deputy County Counsel, for Defendants and Respondents.

WORK, Acting P.J.

cc All parties

APPENDIX A

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIS MARS EMBERTON, et al., Plaintiffs and Appellants, vs. COUNTY OF SAN DIEGO, et al., Defendants and Respondents.	D 003701 (Sup.Ct. No. 519900)

APPEAL from a judgment of the Superior Court of San Diego County, Mack P. Lovett, Judge. Affirmed.

Plaintiffs, Willis Mars Emberton, Phyllis Emberton and Emberton Machine and Tool, Inc. (Emberton) appeal a dismissal for failure to return summons within one year. (Rev. & Tax. Code Section 5147.)

FACTS

On April 24, 1984, Emberton filed a complaint against the County of San Diego,

the Board of Supervisors, the County Assessor, the Auditor/Controller, the Assessment Appeals Board and the County Tax Collector (County) for refund of county property taxes and injunctive relief.

The case was originally assigned to the El Cajon Municipal Court. However, County filed a request to transfer the case to Superior Court in San Diego. Immediately following its request to transfer the case, County filed a general denial.

Emberton filed no opposition to County's request to transfer, nor did he appear personally or through counsel at the hearing on the motion. The request to transfer was granted.

County then filed a motion to dismiss for failure to return summons within one year pursuant to Revenue and Taxation Code Section 5147. The court granted County's motion to dismiss. Emberton appeals.

DISCUSSION

Emberton attacks the constitutionality of Revenue and Taxation Code Section 5147 which provides:

> "No (action for refund) hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein and all such actions hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any defendant therein unless the summons shall have been issued and served and the return thereon made within one year after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended."

A

Emberton argues Revenue and Taxation Code Section 5147 is unconstitutional as applied because its requirement of summons and proof of service returned within one year bears no rational relationship to a legitimate state purpose where, as here, the defendant has answered the complaint. He

also argues the statute violates due process because there is no countervailing state interest of sufficient magnitude to override his denial of access to the court.

Emberton cites no authority for his propositions and we have found none. However, identical arguments have been raised and summarily rejected with respect to the limitations expressed in Code of Civil Procedure Sections 581a[1] and 583[2] (now restated[3]

1/All statutory references are to the Code of Civil Procedure unless otherwise specified.

2/Section 581a reads in relevant part:

> "(a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, ...unless the summons on the complaint is served and return made within three years after the commencement of said action,..."

3/Section 583 reads in relevant part:

> "(a) The court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed..."

in Sections 583.110 et seq.) (See St. Louis - San Francisco Ry. Co. v. Superior Court (1969) 276 Cal. App. 2d 762, 769; Muller v. Muller (1960) 179 Cal. App. 2d 815, 819; Muller v. Coastside County Water Dist. (1960) 180 Cal. App. 2d 712, 713.) These cases rest upon the basic principle that:

> "A constitutional right is always subject to reasonable statutory limitations as to the time within which to enforce it, if the constitution itself does not provide otherwise. The power of the legislature to provide reasonable periods of limitation, therefore, is unquestioned, and the fixing of time limits within which particular

---

"(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action except where the parties have filed a stipulation in writing that the time may be extended.

> rights must be asserted is a matter of legislative policy the nullification of which is not a judicial prerogative." (Muller v. Muller, supra, 179 Cal.App.2d at P. 819 (quoting 31 Cal.Jur. 2d 430; citing Rand v. Bossen, 27 Cal.2d 61 (162 P.2d 457); Sheas v. Robertson, 38 Cal.2d 119 (238 P.2d 982); Fontana Land Co. vs. Laughlin, 199 Cal. 625 (250 P.669, 48 A.L.R. 1308).)

This principal is clearly applicable within the context of Revenue and Taxation Code Section 5147.

While the Legislature has elected to eliminate the return of service requirement from the successor statutes of sections 581 and 583, it did not so remove the requirement from Revenue and Taxation Code section 5147.

Clearly, by setting forth one year service and return statutes in the area of property tax refunds, the Legislature has determined judicial action should be even more expeditious in such cases than in other civil matters. (Ford Motor Co. v. County of Tulare, (1983) 145 Cal.App.3d 688, 694.) The

filing of an answer in a particular case does not change this conclusion. In fact, the Legislature specifically rejected a "general appearance exception" to the one-year service and return deadline (id. at p. 691), serving to underscore its intention that tax refund cases proceed expeditiously.

Moreover, in cases involving tax revenues, government entities have interests distinct from civil actions which do not involve public moneys. Such interests are manifest in that class of cases where, as here, delays in returning tax refunds will accrue interest at public expense.

It is thus in the public's best interest to assure the appropriate parties proceed as expeditiously as possible. Even if the return serves no purpose except as a device to eliminate cases after one year, it is a device which can find a reasonable basis in this need to act expeditiously. Moreover,

the period within which the return service is required, i.e., one year, is unquestionably a reasonable period within which an individual bringing suit may be required to act.

Emberton also fails to demonstrate wherein Revenue and Taxation code section 5147 is unreasonable as applied to him or that he has been denied an opportunity for a hearing. (See St. Louis - San Francisco Ry. Co. v. Superior Court, supra, 276 Cal.App.2d at p. 769.) Thus, there has been no denial of due process.

Moreover, given the fiscal impact upon governmental entities which underlies the refund statutory scheme, the one year limitation is based upon practical considerations, and is applicable to all litigants. Thus the statute meets the test of equality under the same conditions and among persons similarly situated. It does not violate the equal protection clause.

B

As an alternative theory, Emberton argues even if Revenue and Taxation Code section 5147 passes constitutional muster, County is estopped from applying it in this case because (1) it conducted itself in a manner indicating it was proceeding to trial and (2) it waited two months following the one-year period before it filed its dismissal motion.

Approximately two months after the complaint was filed, County requested the case be transferred to superior court. Significantly, this step was taken almost simultaneous with -- four days before -- the filing of County's answer. The timing of the request to transfer reflects the motion to transfer was employed properly as a device to have the case filed and heard in what County considered to be the appropriate court. Moreover, it was filed early in the

statutory period. Given these factors, the motion cannot be said to have "lulled" Emberton into failing to comply with his own filing requirements. Nor is there any evidence Emberton relied on County's actions. Indeed, it appears the motion had no effect whatsoever on Emberton. He failed to respond in writing to the motion to transfer, or even to make an appearance at the hearing on the motion.

Those cases which have applied the estoppel theory and thereby waive statutory filing periods have done so where the voluntary actions of the defendant have indicated an intent to submit the matter to trial on the merits. Thus, in Synanon Foundation, Inc. v. County of Marin, (1982) 133 Cal.App.3d 607, 609, estoppel was applied to bar dismissal under Revenue and Taxation Code section 5147, where the defendants filed an answer, answered interrogatories, complied

with requests to produce, permitted filing of an at-issue memorandum and arranging of a trial setting conference, and filed their motion to dismiss two years after it was available.

Emberton's observation that County filed its dismissal motion two months after it could have done so does not strengthen his case. The two month period cannot be said as a matter of law to be unreasonable. Moreover, even when viewed in combination with the filing of the request to transfer, there simply is no evidentiary support for the allegation County intended to proceed to

trial or lull Emberton into believing it would.

DISPOSITION

The judgment is affirmed.

BENKE, J.*

WE CONCUR:

WORK, Acting P.J.

BUTLER, J.

*Assigned by the Chairperson of the Judicial Council.

FILED DECEMBER 17, 1986

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D003701

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

EMBERTON et. al.

v.

COUNTY OF SAN DIEGO et. al.

Appellants' petition for review DENIED.

BIRD

Chief Justice

APPENDIX B

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIS MARS EMBERTON, et. al.

Plaintiffs and Apellants,

v.

COUNTY OF SAN DIEGO, et. al.,

Defendants and Respondents.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

DAN ZEIDMAN, being first duly sworn, deposes and says that he is a member of the Bar of the Supreme Court of the United States; that on March 16, 1987, the Petition for Writ of Certiorari in the above-entitled case was deposited in a United States post office mail box located in San Diego County, California, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing

said petition, and with an additional copy being mailed to the following:

Lloyd M. Harmon, Jr., County Counsel
County of San Diego
Daniel J. Wallace, Chief Deputy
Bruce W. Beach, Deputy
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469

Honorable Mack P. Lovett
Judge of the Superior Court
220 West Broadway, Dept. 35
San Diego, CA 92101

California Supreme Court
3580 Wilshire Blvd.
Room 213
Los Angeles, CA 90010

Court of Appeal
Fourth Appellate Dist.
Division One
1350 Front Street
Room 6010
San Diego, CA 92101

Dated at San Diego County, California
this 16 day of March, 1987.

DAN ZEIDMAN, Affiant

Subscribed and Sworn to Before me
this 16 day of March, 1987

Debra Lynn Rasner
Notary Public in and for said
County and State

Supreme Court, U.S.
FILED
APR 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1499

In The

Supreme Court of the United States

October Term, 1986

WILLIS MARS EMBERTON and PHYLLIS EMBERTON, dba EMBERTON MACHINE AND TOOL, INC., A California corporation,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 86-1499

In The

Supreme Court of the United States

October Term, 1986

WILLIS MARS EMBERTON and PHYLLIS EMBERTON, dba EMBERTON MACHINE AND TOOL, INC., A California corporation,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent COUNTY OF SAN DIEGO, a public entity and a political subdivision of the State of California opposes the petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate

District, Division One, and files this brief setting forth the reasons for its opposition.[1]

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STATEMENT OF FACTS

On April 24, 1984, petitioner Willis Mars Emberton and Phyllis Emberton, dba Emberton Machine and Tool, Emberton Machine and Tool, Inc. (hereinafter referred to as "Emberton") filed a complaint for refund of personal property taxes on machinery and equipment and injunctive relief against respondents County of San Diego, Board of Supervisors of the County of San Diego, Assessor of the County of San Diego, Auditor/Controller of the County of San Diego, Assessment Appeals Board of the Board of the County of San Diego and Tax Collector of the County of San Diego (hereinafter referred to as "County"). Emberton served his complaint upon County on July 17, 1984. The case was originally filed in the El Cajon Municipal Court. However, on August 6, 1984, County requested transfer to Superior Court in San Diego. On September 26, 1984, after hearing on September 20, 1984, and without opposition or appearance from Emberton, the Court granted transfer of the case.

On August 10, 1984, immediately after requesting transfer, County filed its general denial to the complaint. On June 27, 1985, one year, two months after the complaint was filed and summons issued, County filed its motion to dismiss the complaint pursuant to Revenue and

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[1] Rule 28.1 of the Rules of the Supreme Court is not applicable.

Taxation Code section 5147. On August 2, 1985, the Court granted County's motion to dismiss, issuing its order on August 14, 1985.

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STATEMENT OF THE CASE

Emberton filed suit against County for refund of personal property taxes on April 24, 1984 and served the complaint on July 17, 1984. On August 10, 1984, County filed its general denial to the complaint. Emberton failed to comply with Revenue and Taxaation Code section 5147, requiring the summons to have been issued and served and return made within one year after commencement of the action. On June 27, 1985, County filed its motion to dismiss for failure to comply with Revenue and Taxation Code section 5147, which the Court granted on August 14, 1985.

Emberton appealed the judgment granting dismissal, which was affirmed by the Court of Appeal on September 23, 1986, and certified for publication on October 8, 1986. Emberton petitioned for review by the California Supreme Court, which was denied December 17, 1986.

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ISSUE PRESENTED

Was Emberton denied his constitutional rights when his complaint for tax refund was dismissed for failure to return summons within one year as required by California Law?

———o———

ARGUMENT

I

REVENUE AND TAXATION CODE SECTION 5147 IS NOT UNCONSTITUTIONAL

Emberton contends that Revenue and Taxation Code section 5147 which reads as follows is unconstitutional as a violation of due process and/or equal protection:

> "No such action hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all such actions hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any defendant therein unless the summons shall have been issued and served and the return thereon made within one year after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended."

The contention is without merit.

As an analogy, similar arguments have been raised with respect to the limitations expressed in previous Code of Civil Procedure sections 581a and 583, and now restated in Code of Civil Procedure section 583.110 et seq. In *Muller v. Coastside County Water Dist.* (1960) 180 Cal. App.2d 712, 713, an appeal was made of the court's order on its own motion dismissing plaintiff's action for failure to serve the summons and complaint within three years after commencement of the action pursuant to section 581a of the Code of Civil Procedure. In *Muller*, it was undisputed that the complaint was filed on December 30, 1955, and that the complaint and summons had not been served

when the court made its order of dismissal on January 12, 1959. The court held that:

> "The appellant's challenge to the constitutionality of section 581a of the Code of Civil Procedure on the grounds that it is unreasonable, discriminatory and violative of due process and the equal protection of the law is frivolous and without substance. Appellant cites no authority for such a proposition nor is any to be found."

In the case of *St. Louis-San Francisco Ry. Co. v. Superior Court* (1969) 276 Cal.App.2d 762, 768-769, the appellant contended that section 583 of the Code of Civil Procedure, requiring a case be brought to trial in three years after a reversal on appeal, was unconstitutional as violating both the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. (*St. Louis-San Francisco Ry. Co. v. Superior Court, supra,* at 768.) The court rejected the due process argument on the basis that the three year period was a reasonable time and counsel failed to demonstrate any reason for his lack of diligence.

The court also held that the dismissal statutes are not unconstitutional on the ground that they deny a plaintiff the right to prosecute actions for protection and preservation of his property. The plaintiff failed to demonstrate where the statute was unreasonable as applied to him or that he was denied an opportunity for a hearing. The court held that the dismissal statutes were a reasonable classification applicable to all litigants and as such, met the test of equality under the same conditions and among persons similarly situated. (*St. Louis-San Francisco Ry. Co. v. Superior Court, supra,* at 769.)

Although Emberton argues that the law is unequally applied, it is simply not true. Rather, Emberton proceeded with a lack of diligence, failing to avail himself of the access provided by law. As stated in *Wood v. Pendola* (1934) 1 Cal.2d 435, 444, "the mere procedure by which jurisdiction is to be exercised may be prescribed by the legislature has been long recognized." This same basic principle was also stated in *Muller v. Muller* (1960) 179 Cal.App.2d 815, 819, repeated by the Court of Appeal in this case and held clearly applicable to Revenue and Taxation Code section 5147. The policy of the state does nothing more than require a plaintiff to proceed with reasonable diligence in the prosecution of an action with the dismissal statutes designed to encourage diligence. (Code Civ. Proc., § 583.130; *General Ins. Co. v. Superior Court* (1975) 15 Cal.3d 449, 454.) Emberton lacked diligence, offered no reason for his lack of action and the matter was dismissed for this reason.

II

REVENUE AND TAXATION CODE SECTION 5147 WAS NOT WAIVED BY COUNTY

Emberton contends that County is estopped or has waived Revenue and Taxation Code section 5147 by its actions. Emberton reaches this conclusion by arguing two points: (1) that County by its conduct, intended to proceed with the trial on the merits; and (2) by waiting approximately two months following the one year period to return the summons and proof of service before filing its motion for dismissal. There is no action on County's part, much less the above two stated, which leads to the conclusions Emberton asserts.

In *Synanon Foundation, Inc. v. County of Marin* (1982) 133 Cal.App.3d 607, the court invoked a waiver to Revenue and Taxation Code section 5147 since the voluntary actions of the defendant indicated "an unequivocal intent to submit the issues to a trial on the merits." (*Id.* at 609.) Not only did the defendants in *Synanon* answer without objecting to plaintiff's failure to make a timely return of summons, they answered interrogatories and complied with requests for production of documents. In addition, when the plaintiff filed his at-issue memorandum, the defendant likewise failed to object. Only after the court set the matter for a trial setting conference did the defendant file its motion to dismiss, nearly two years after plaintiff's noncompliance with Revenue and Taxation Code section 5147. The court concluded that the lengthy delay and the advanced stage of the litigation at the time that the defendant moved to dismiss manifested an intent to have a judicial determination on the merits and the defendant thereby waived its right to pursue a dismissal under Revenue and Taxation Code section 5147.

Here, County filed a general denial and promptly moved for a dismissal under Revenue and Taxation Code section 5147. Emberton made no attempt at discovery and did not file any at issue memorandum. The only action of any type in the case was County's motion objecting to proceeding in the El Cajon Municipal Court. Emberton neither appeared nor filed opposition to the motion and the matter was transferred as requested. Neither the filing of the general denial nor the unopposed motion to transfer are sufficient to justify a finding that County unequivocably intended to proceed with trial on the merits.

This case is analogous to *Ford Motor Co. v. County of Tulare* (1983) 145 Cal.App.3d 688, where the court dismissed an action based upon a failure to comply with Revenue and Taxation Code section 5147. In that case, a general denial had been filed by the defendants. However, the plaintiffs maintained dismissal was improper since the general denial constituted a general appearance. Additionally, plaintiffs contended the existence of implied exceptions for waiver and estoppel precluded dismissal.

In response, the court noted the absence of a general appearance exception to the Revenue and Taxation Code statute. Furthermore, the court found the omission of the exception to be intentional, because a prior draft of the statute had contained such an exception, and stated:

> "Such a holding under the instant facts would amount to a judicial rewriting of the statutory exception contained in section 5147 to add as an additional exception a general appearance by a respondent. The legislative history of section 5147 establishes this is not an exception the Legislature intended in the revenue and taxation area. To so hold in this case would eviscerate the obvious legislative intent." *Ford Motor Co. v. County of Tulare, supra,* 145 Cal.App.3d at 693.

Thus, the general appearances exception was specifically determined not to apply in tax refund actions.

The court also addressed the issue of waiver and estoppel and found it inapplicable. Plaintiff had filed the complaint on December 2, 1980 and service of summons was made on December 9, 1980. Defendant answered the complaint with a general denial on December 27, 1980. The return of summons had not occurred by December 3, 1981. Defendant filed a motion to dismiss pursuant to section

5147 of the Revenue and Taxation Code on December 14, 1981, and the motion was granted by the court on February 23, 1982.

There is no distinction between the present case and *Ford Motor Co. v. County of Tulare, supra,* 145 Cal.App. 3d 688. Certainly, County's motion objecting to El Cajon Municipal Court and requesting the matter be transferred to San Diego Superior Court was not sufficient conduct to conclude a waiver of Revenue and Taxation Code section 5147. Nor is it relevant when the motion to dismiss was filed after the one year statutory period had run. The fact that the motion itself was filed two months after the statutory period ran rather than one day does not change the circumstances that occurred from the date of filing of the complaint to the end of the statutory period for returning the summons to the court or for that matter, to the date of the filing of the motion to dismiss.

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CONCLUSION

Revenue and Taxation Code section 5147 is not unconstitutional and did not deprive Emberton of due process and/or equal protection. Rather, Emberton failed to avail himself of that process which was available and disclosed no facts justifying his lack of diligence in pursuing the matter. Additionally, the one year period of time is a practical procedural consideration and is a reasonable

classification applicable to all litigants. It meets the test of equality under the same conditions and among persons similarly situated. As such, the petition should be denied.

Respectfully submitted,

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By BRUCE W. BEACH, Deputy
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DATED: April 9, 1987